

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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VERISIGN, INC., :
Plaintiff,
:
vs. : Case No. 1:14-cv-1749
:
XYZ.COM, LLC, et al., :
Defendants.
:
-----:

HEARING ON MOTIONS

June 12, 2015

Before: Michael S. Nachmanoff, Mag. Judge

APPEARANCES:

Randall K. Miller and Nicholas M. DePalma,
Counsel for the Plaintiff

Derek A. Newman and Timothy J. Battle,
Counsel for the Defendants

1 NOTE: The case is called to be heard at 10:08 a.m.
2 as follows:

3 THE CLERK: VeriSign, Incorporated versus XYZ.com,
4 LLC, et al., case number 14-cv-1749.

5 MR. MILLER: Good morning, Your Honor. Andy Miller
6 and Nick DePalma for VeriSign. We are here with our in-house
7 counsel, James Hubler.

8 THE COURT: Good morning.

9 MR. DEPALMA: Good morning, Your Honor.

10 MR. HUBLER: Good morning.

11 THE COURT: Good morning.

12 MR. BATTLE: Your Honor, Timothy Battle as local
13 counsel. I am here with Derek Newman, who has been admitted
14 pro hac vice for the defendants XYZ.com and Daniel Negari.

15 THE COURT: Good morning. Good morning, Mr. Newman.

16 MR. NEWMAN: Good morning.

17 MR. BATTLE: Mr. Newman will handle the argument
18 today.

19 THE COURT: Thank you. So what I would like to do,
20 and I am happy to hear from you, Mr. Miller, we have two
21 motions still pending. I was hopeful that perhaps the extra
22 time would allow the parties to talk a little bit further and
23 narrow the issues and also have time to produce further
24 documents because both parties indicated in the various
25 pleadings that with regard to a number of issues, it didn't

1 seem like there was a dispute as to whether documents should be
2 produced. It was a matter of whether they had been produced
3 fully or the timing of when they would be produced.

4 And so, I was slightly optimistic that the passage of
5 time would at least narrow issues because it would give the
6 parties a little bit more time to work those things out and
7 turn them over.

8 I appreciate the reply brief that plaintiff provided,
9 which did I think substantially narrow the outstanding issues,
10 and we can go over those. I think with regard to the
11 defendants' motion, at least as I read the reply brief, there
12 was less that had been narrowed by the parties.

13 And so, although I'm not eager to do it, if we need
14 to go through it extensively, we can do that because we need to
15 get resolution for both sides here so that you can get on to
16 the more substantive issues in the case.

17 MR. MILLER: Yes, Your Honor. We have worked hard to
18 narrow the issues. What I would propose to do, I just have
19 three points to make about our motion that might be a way of
20 further narrowing, just to tee up like three discrete issues
21 for the Court to consider and then maybe go from there.

22 THE COURT: That would be fine.

23 MR. MILLER: Okay. So with respect to our motion, I
24 have three points. The topics are the bulking strategy that
25 we've been unraveling. There is this Net Saw agreement. And

1 then there are e-mails. And let me just take those in turn.

2 One of the difficulties, and it has to do -- there is
3 an element of like what format the documents are being produced
4 in. There is also sort of what is being produced.

5 Now, I think Mr. Newman has said in his papers, I'm
6 sure he'll say today, that there has been 73,000 pages produced
7 to us, which --

8 MR. NEWMAN: 134,000.

9 MR. MILLER: It's now 100 -- well, there was a
10 2:44 a.m. e-mail, is that -- okay. So there was an e-mail that
11 came in this morning. So is that the delta between 73 and --
12 there was an e-mail that came in at 2:44 this morning that we
13 haven't had a chance to review. The last number that I am
14 aware of is the 70 -- something like 74,000.

15 The problem -- that sounds like an enormous
16 production, so it sounds like they're doing a lot. The problem
17 is, we're getting stuff -- and I have brought examples to show
18 you because I think unless you see it, it's difficult to
19 describe --

20 THE COURT: Well, I don't want to cut you short, but
21 with regard -- you set out very well the Excel spreadsheets
22 that were divided into 40,000 PDFs. And that if the issue of
23 providing it in native format, or in an OCR format --

24 MR. MILLER: Yes.

25 THE COURT: -- or in a way that could be looked at,

1 would be far more valuable. And so, I'm not so concerned with
2 the total number of pages.

3 MR. MILLER: Okay. Okay.

4 THE COURT: I get the argument --

5 MR. MILLER: Okay.

6 THE COURT: -- that there can be a very large number.
7 But in fact, if an Excel spreadsheet is divided up into PDFs,
8 it can seem like a tremendous amount of information and it's
9 really useless.

10 MR. MILLER: And just to complete this bulking point,
11 in addition to the printout of the Excel spreadsheet at 40,000
12 pages, there is also extensive materials produced that are in
13 Chinese, and I'm not sure what that is. There is extensive
14 material that is produced that appears to literally be
15 gibberish in the sense that it's just characters and numbers on
16 a piece of paper and a lot of blank pages.

17 There is also extensive production of other parties'
18 Web sites, including hardcore pornography Web sites. I believe
19 this is an attempt to show that there are people that are
20 actually using XYZ domains, and so they're producing their Web
21 site to show the actual use, but it's just -- we didn't ask for
22 that and it's extensive.

23 So that when you get past the categories of bulking
24 that I sort of at a high level described, what's then left, you
25 know, is sort of what might be hopefully responsive to our

1 document requests, and it's very little.

2 And so, let me just move on to the other two of the
3 three points I have to ask what we would be looking for today
4 and just trying to narrow it. We've asked for e-mails -- what
5 we would expect to see in a case like this is that Daniel
6 Negari of XYZ and other personnel that have already been
7 identified as persons with knowledge would be e-mailing each
8 other, for example, about the advertising. We've asked for
9 e-mails about VeriSign, that mentioned VeriSign, or that
10 mention the Network Solutions deal that's at the center of the
11 case.

12 And we've gotten -- I mean, there are maybe a couple
13 pieces of paper, but it's not produced in native format. There
14 is no way to tell whether there is attachments or other e-mails
15 associated with it because of the absence of the native format.

16 And the volume, which is literally sort of a piece of
17 paper here and there, suggests to me that there is a
18 significant production that is still to be done.

19 Now, you know, in our discussions there have been --
20 and maybe this 2:44 a.m. e-mail this morning represents sort of
21 a narrowing of what I just described, but that's -- we have to
22 start taking depositions. We had a deposition of Mr. Negari
23 scheduled that we pushed off so that we could try to narrow
24 these issues. That deposition now is going forward on Monday.

25 But I just believe that the e-mails that we would

1 expect to see, especially among the people who are identified
2 as persons with knowledge in the initial disclosures, that
3 there would be some discussion about -- you know, Mr. Negari,
4 for example, says that he has a multimillion dollar advertising
5 budget annually in his interviews publicly, but we haven't seen
6 any -- there is no work-up, there is mock-up of the
7 advertising, there no conceptualization, there is no e-mails
8 back and forth.

9 One other aspect of this is we asked for e-mails with
10 certain third parties. For example, this company Donuts.
11 There is a motion to quash a subpoena in Seattle in which there
12 was a representation, oh, we're all -- we don't have to produce
13 documents in Seattle because we're producing them here in
14 Virginia. But there was nothing produced initially. And then
15 after we asked about that, after that declaration was filed, we
16 got like six pieces of paper.

17 And again, it's not in a native format. There looks
18 like there is these big gaps on those six pages that look like
19 material might be redacted. We just have no idea, no way of
20 knowing.

21 And so, the concern is that we want to be able to do,
22 as best we can, complete depositions. We have to start
23 immediately as of Monday. I'm flying out to Los Angeles to
24 take Mr. Negari's deposition, and I don't want to have to come
25 back here and ask you to reopen that if we get, you know, all

1 the stuff later. I mean, we'll try to review the material that
2 came in at 2:44 a.m.

3 But this concept of e-mails, internal e-mails and
4 e-mails with certain third parties, is probably the number one
5 issue. The bulky material, the pornographic sites, the long
6 lists and everything else, are not responsive and they are not
7 helpful, they don't advance the ball. And it is sort of
8 misleading to put out the 124,000, whatever it is, aggregate
9 number, when it's probably more like a much smaller set.

10 The final thing I would say is we told you that
11 certain issues were moot in our filing, I think it was
12 yesterday or the day before. But we're just not sure because
13 we -- for example, one of those issues was the Network
14 Solutions contract between XYZ and Network Solutions. We asked
15 them -- we said, would you please produce that, that's a key
16 document.

17 So they said, okay, here it is, and they identified
18 it by Bates number. And we said, okay, good, we got it, that
19 issue is now moot. Last night Network Solutions produced
20 documents in response to a subpoena and they gave us this other
21 document that is a contract between Mr. Negari, signed by Mr.
22 Negari with Network Solutions that we didn't get from the
23 defendants.

24 So again, I think it might just be a matter of like
25 we're finally now focussed on the task and working hard, but

1 it's difficult for us to prepare for depositions when we've got
2 boxes and boxes of, you know, lists and pornography and
3 everything else, but we don't have any of the Network
4 Solutions. For example, no e-mails about Network Solutions,
5 this deal.

6 And just so the Court understands the relevance,
7 we've alleged in the complaint, and we've talked about this
8 extensively in the motion for judgment on the pleadings, that
9 the number one advertising message that we're worried about is
10 they went out to the market and said, we have 447,000
11 registrations in the first six months. And this is in August.

12 And we said, those are phantom, those are not actual
13 purchasers. Those are just made-up people, that you just gave
14 them away, people didn't even know that they had them. We want
15 to know about -- and they said, well, we had Network Solutions
16 do that. We don't really know exactly how they did it, we had
17 Network Solutions do that. But they paid us for it -- Mr.
18 Negari went out and gave interviews and said, well, I got \$8 a
19 domain name for that, so I got paid.

20 But then it comes -- then we see other interviews
21 that he is giving where it's clear that he didn't get paid.
22 That there is actually -- those are free give-aways.

23 So that's kind of like the number one transaction at
24 issue in this case. We don't have any e-mails. We don't know
25 exactly how the deal was negotiated. We don't know what the

1 e-mails between Network Solutions and Mr. Negari could be. I'm
2 going to ask him on Monday about this, and, you know,
3 presumably he's going to say that there are other
4 correspondence and e-mails.

5 The final thing I would say and I will sit down is
6 that this is a Lanham Act false advertising case. We have one
7 count, false advertising. We would expect to see e-mails and
8 communication about these advertising statements. The two at
9 the center of the case are what I just described, the 447,000
10 registrations when in fact they are fake, they are not real
11 people, they are not real testimonial lists, not real users of
12 XYZ, they are just made up numbers.

13 The second is this gross exaggeration of the
14 availability of .com domain names. Mr. Negari says there is
15 nothing but a dash and a couple of numbers left. But millions
16 of people register .com every quarter.

17 There has been in the papers, including the briefs
18 submitted to you, this mischaracterization of our -- what
19 advertising statements we're challenging. They say in their
20 most recent paper like we're -- you know, that we complain
21 about this dusty car that is compared to .com. That is
22 described in the complaint for sure, but the advertising
23 statements are the two that I just gave you: 447,000
24 registrations when in fact that's fake, no one exists and he
25 never got paid; and there is nothing available on .com except

1 some dashes and numbers and gibberish. That's not true,
2 millions of people register every quarter. That's the
3 advertising claim.

4 So there has been in the papers, you know, attempts
5 to say, oh, they complain because we compared .com to a dusty
6 car. That's not the advertising statement.

7 So those are the two advertising statements. And
8 we're simply looking for documents and e-mails about those two
9 statements, about the Network Solutions deal so that we can
10 test it and be prepared for trial.

11 THE COURT: Thank you. Mr. Newman, let me start by
12 asking and you a couple of questions to try and focus this
13 discussion.

14 With regard to the issue of the ESI, is there a
15 reason or an impediment to providing the information, for
16 example, the Excel spreadsheets in Excel, or in the native
17 format, or in an OCR way, obviously going beyond Excel, so that
18 whatever is produced can be easily looked at and reviewed in a
19 meaningful way?

20 MR. NEWMAN: No, Your Honor. Which is why as soon as
21 they raised the issue, we produced it.

22 The Court should deny the motion to compel for two
23 reasons. The first is, everything that VeriSign seeks in its
24 reply brief, it didn't ask for in its opening motion. These
25 are new issues. They didn't meet and confer about those

1 issues. But as soon as we received the reply brief, we
2 communicated with them and produced everything they asked for.

3 So, for example, yesterday my colleague spoke with
4 Mr. DePalma, my friend here to your left, and specifically
5 provided to him every Excel document he wanted.

6 And what I have here is the e-mail that Mr. Miller
7 refers to. The e-mail has by Bates numbers the replacements.

8 So Mr. DePalma said, here is the Bates range of Excel
9 documents we can't read. We replaced them and then we gave
10 them in this e-mail right here Bates numbers that say where the
11 native files are.

12 And there is a huge irony to this argument. Namely,
13 VeriSign's production to XYZ was all gibberish without load
14 files that couldn't be used in Relativity. They only have
15 2,000 pages, so it's easier to go through than ours, but it's
16 ironic that they're making the complaint. We replaced it as
17 soon as they raised it, but yet they have not replaced their
18 production which we can't read and is totally deficient.

19 THE COURT: Well, I want to be sure that we go
20 through all of the issues here, but I think just for the sake
21 of clarity for my sake, let's talk about the plaintiff's motion
22 first and then we'll talk about the defendants' motion. And
23 certainly it's helpful to know to the extent that they're
24 providing things in one format or another, but let me just make
25 sure that I'm clear.

1 What you're saying to me is that they have in their
2 possession now in electronic format the ability to look at
3 those Excel spreadsheets and other things that were provided
4 solely as single page PDFs in native format or in a standard
5 loadable format, is that correct?

6 MR. NEWMAN: Yes, Your Honor.

7 THE COURT: Okay. Let me just very quickly make sure
8 that there isn't a difference of opinion there.

9 Mr. Miller, is there any confusion about that at this
10 point?

11 MR. MILLER: Your Honor, so I've -- what I've been
12 handed is an e-mail, I think it's dated -- is it dated
13 yesterday? Is it yesterday that this --

14 MR. NEWMAN: Yes.

15 MR. MILLER: So there is a 2:44 a.m. this morning
16 e-mail with additional production, and apparently yesterday
17 there is an e-mail to Mr. DePalma with attachments.

18 And so, part of it is that I thought we had to keep
19 this motion on file so that maybe we could have a surge of
20 activity at the last moment, and that appears to have been what
21 has happened. But we haven't had a chance to review the
22 2:44 a.m. this morning production and this e-mail that came in
23 yesterday, we haven't been able to evaluate how it lines up
24 with the 40,000 pages of lists and columns. But maybe it
25 narrows the issue.

1 MR. NEWMAN: This issue wasn't raised until recently,
2 and we addressed it as soon as it was raised.

3 As to the --

4 THE COURT: Well, my inclination is to recess court
5 and have the lawyers talk to each other. It is the least
6 efficient way to resolve this by having me ask questions and
7 then confirm with each set of lawyers what's going on. And I
8 certainly appreciate that an e-mail received at 2:40 in the
9 morning is difficult to have reviewed and compared to documents
10 by 10 o'clock this morning, but it is somewhat frustrating for
11 me to be in the position of hearing this played out now,
12 especially after the parties had an extra week when we
13 continued this matter.

14 And so -- and to the extent we get to the defendants'
15 motion, and there are issues with regard to the manner in which
16 documents were provided by VeriSign to XYZ that are difficult
17 look at in their format, obviously that's something that will
18 need to be addressed.

19 You know, both of you submitted a joint discovery
20 plan that addresses ESI and makes clear, as you would expect in
21 any litigation, that the parties will work together to provide
22 information in the most cost effective and reasonable manner so
23 that they can be looked at, whether that's PDFs or OCR readable
24 or in the native format. And sophisticated lawyers and
25 sophisticated clients like this should be on top of that issue

1 right from the start, it shouldn't require sending documents
2 and then having the other set of lawyers ask to get it in a
3 different format.

4 So I'm, you know --

5 MR. NEWMAN: Your Honor --

6 THE COURT: And so, that is simply consistent with
7 the joint discovery plan, and we can address that after we
8 recess and you talk about it. But before we do that, let me go
9 through these other issues.

10 One of the issues that they've raised were specific
11 requests for production of documents related directly to
12 e-mails that are specifically relevant to the deposition that
13 is set on Monday.

14 So my first question is, are there any e-mails that
15 you are aware of that are responsive to the discovery requests
16 that have been propounded, especially of Mr. Negari, whether
17 they are about contracts with Network Solutions, or they are
18 about the advertising campaign, or the multimillion dollar
19 budget, or contacts with the commentators who are listed,
20 including NPR and the others who had articles about XYZ, the
21 things that are specified there? My understanding is that
22 there are either no e-mails or a very small number. I think
23 the number of e-mails referred to with regard to Donuts was
24 six.

25 If that's all there is, that's all there is. And if

1 you want to put it on the record and tell the Court that that's
2 all that exists, then so be it. You can't produce things that
3 don't exist.

4 But if there is a trove of e-mails that are
5 responsive to requests that have been made, then they need to
6 be produced. And frankly, they need to be produced before the
7 deposition or Mr. Negari is going to have to be subject to
8 sitting down a second time after those documents are produced.
9 That is inefficient, I am sure it's not convenient for Mr.
10 Negari. Frankly, it's not convenient for the lawyers. Even
11 though everyone prefers to have two shots than one, I'm sure
12 they would prefer to do a single deposition in which they get
13 it all done at one time.

14 So I'm asking you, are there any documents that are
15 responsive to the requests for production, including 16 and 19
16 and the other ones that have been specified in the papers, that
17 have not been turned over?

18 MR. NEWMAN: Your Honor, there are no documents
19 responsive to any of VeriSign's requests for production of
20 documents that XYZ hasn't already produced.

21 The 134,000 pages of documents is not bulking. They
22 are documents that are responsive to requests. I know they are
23 responsive to requests because we had nine lawyers sitting in a
24 room for weeks seven days a week reviewing them and preparing
25 logs.

1 The Donuts e-mails, for example. As soon as VeriSign
2 said, we don't see Donuts' e-mails, we identified them by Bates
3 numbers. We weren't required to do that, but we did that.

4 And I should also add that a lot of the e-mails that
5 VeriSign is requesting here today are not responsive. There is
6 no requests for e-mails with Network Solutions. There is
7 requests for agreements with Network Solutions, which have been
8 provided on multiple occasions.

9 And XYZ is not withholding any documents. We have
10 fully completed the delivery of documents. It was a huge
11 burden, it was a huge expense. XYZ engaged an outside vendor
12 to do the search. One of the requests was for every document
13 that mentions .com or VeriSign. Almost impossible because
14 every e-mail address has .com.

15 So we contacted VeriSign and we said, this is almost
16 impossible. VeriSign says, here are some search queries we
17 would like you to run. We did that. That turned up several
18 hundred thousand pages of documents. We narrowed those, we
19 reviewed them, we produced them all.

20 When VeriSign complains about this bulking, it's
21 largely in response to that particular request for production
22 of documents.

23 When VeriSign talks about Chinese, that's because in
24 the complaint and in the requests for production of documents
25 VeriSign refers to this Xin Net, which is a Chinese registrar.

1 And VeriSign wants all the promotions in connection with that
2 registrar. We produced them. They are in Chinese. We have no
3 obligation to translate them. And we haven't translated them.
4 We're producing exactly what was made available on the Internet
5 because VeriSign asked for it.

6 THE COURT: Okay. Why don't you address the
7 outstanding issues with regard to your motion, and then I think
8 we'll recess so that the parties can talk further to see
9 whether or not after we have had this discussion there is
10 anything that's been resolved and doesn't require a ruling from
11 me.

12 MR. NEWMAN: Your Honor, every issue in our motion
13 remains outstanding. This is a case between two competitors in
14 the highly competitive field of domain names. It hasn't always
15 been highly competitive. Rather, VeriSign had a legal monopoly
16 for almost two decades, but recently the domain name business
17 has been opened up to competition. There are now hundreds of
18 competitors. And everyone seems to be surprised that one of
19 the least capitalized of those competitors, XYZ, has sold more
20 domain names than anybody else.

21 VeriSign has identified in its Security's filings and
22 publicly that there is huge risk to VeriSign investors because
23 of all the new domain name competitors, and VeriSign has every
24 interest in ensuring that the competition doesn't ruin what was
25 a monopoly. XYZ being the largest, VeriSign files this

1 lawsuit. The lawsuit lacks merit. The claims that VeriSign
2 makes I think fail as a matter of law.

3 We've requested documents to prove the defense. For
4 example, as VeriSign notes, one of the most intense issues in
5 this case is whether registering free domains and then
6 publicizing the number of domains constitutes false
7 advertising. It doesn't. It doesn't because VeriSign did it
8 for years, did it for years and then entered into a new
9 agreement with this company ICANN that prohibited it from
10 certain marketing practices.

11 Its risk profile in its Security's filings indicate
12 that it's at a competitive disadvantage because all the other
13 competitors are allowed to run certain promotions that it is
14 not. We need that agreement with ICANN, we need to see that.

15 We also need to see the correspondence internally at
16 VeriSign. For example, I would expect there would be e-mails
17 where one VeriSign person would say, what could we sue Negari
18 for? And the other says, how about false advertising. And
19 then a response that says, it's not false advertising, we've
20 been doing it for years. That would support our defense.
21 We're confident those type of materials exist. We are entitled
22 to them.

23 Our motion seeks everything that we requested in our
24 requests for production of documents. VeriSign complains that
25 there is lots of requests. But most of them are contention

1 interrogatories, produce all documents relating to your
2 contention that. It's a single sentence, it's one line or two,
3 it's very limited, it's very narrow. It goes directly to
4 what's in the complaint and we're entitled to it.

5 VeriSign wants to edit it to produce all documents
6 that support your contention that, because obviously VeriSign
7 doesn't want to disclose the e-mails that hurt its case, but
8 XYZ is entitled to that because we need to defend the case.

9 VeriSign has produced very little, 2,000 pages. A
10 couple weeks ago I conferred with VeriSign's counsel and I
11 said, you've only produced a few hundred pages, 1,500 I think
12 it was at the time. He said, we have 65,000 pages coming.

13 And we had set up our lawyers, our room of lawyers to
14 be prepared for this. It never arrived. I sent an e-mail
15 asking about it. And he said, that was just an estimate.

16 And so, what my guess is is that VeriSign internally,
17 the lawyers, the good gentlemen who are representing VeriSign,
18 found 65,000 responsive documents and then conferred with their
19 client and their client said, don't produce this. And so, what
20 did they produce? They produced copies of XYZ 's Web site, we
21 have that. They produced Security's filings that we had before
22 they filed the lawsuit because it's all public. And they
23 produced a single marketing report over and over and over
24 again, none of which was produced in the ESI format consistent
25 with the joint status report. Which is why I said earlier that

1 their argument on that point is ironic. As soon as they raised
2 it with us, we replaced it.

3 They've promised to replace it too, but they won't
4 say when, and they haven't. It's only 2,000 pages, they should
5 be able to replace it. But we're entitled to everything that
6 we've asked for.

7 And I'm happy to address any of the arguments or go
8 through one by one and argue why each one of the requests are
9 relevant and necessary for XYZ to defend its case.

10 THE COURT: Well, if we have to do that, we will, but
11 I'm not going to ask you to do that now.

12 Let me hear from Mr. Miller.

13 MR. MILLER: There is just one point. I know that
14 you want us to go confer, so I don't want to go through
15 everything that he just said, but there is just one point that
16 is absolutely important. Which is, we have complied with the
17 OCR native format requirements.

18 We produced in the usable form as we would have
19 expected. We've never deviated from that. Now, had we not
20 done so, our production would have been over 100,000 pages
21 because that's what happens if you just PDF the images of all
22 the different columns of a really robust piece of data.

23 The reason why our production, which is actually
24 4,000 pages, which includes a lot of internal marketing --
25 sensitive marketing materials that they've asked for that we

1 gave them, the reason why it's 4,000 pages rather than 100,000
2 pages is because we actually produced it in native format.

3 But we're happy to go in the hallway with these
4 gentlemen and try to narrow the issues further, but it's just
5 not -- the representation that we've not produced -- we've not
6 complied with our discovery obligations, is not correct.

7 THE COURT: Well, thank you. It's very hard for me
8 to understand exactly what's going on here because I have very
9 experienced counsel. And, frankly, you're more technologically
10 savvy than I am. And clearly Mr. Newman is representing that
11 what he has got is not searchable, is not in the native format,
12 and has not been produced pursuant to the joint discovery plan.
13 And you're telling me exactly the opposite.

14 And so, only one of those things can be accurate.
15 And so, it means one of the three of us is not understanding
16 what's going on.

17 So perhaps talking to each other to determine what it
18 is that's already been produced would be helpful in narrowing
19 or eliminating that particular issue. It certainly sounds to
20 me like both counsel are articulating that they understand
21 there is an obligation and that it is appropriate to produce
22 documents in a way that is easily searchable and manipulable by
23 the other side so that they can look at what they have and
24 understand it.

25 MR. NEWMAN: Your Honor, yesterday my colleague and

1 my friend here to your left met and conferred about this. The
2 confirming e-mail I have from our firm to its firm talks about
3 how the production didn't include metadata necessary to load
4 the images and texts into Relativity. We asked if they would
5 provide that. We didn't receive a response.

6 We also on that call showed them examples of
7 documents that were illegible, that couldn't be read. They
8 said they would replace them. We haven't received them.

9 We've had our discovery requests outstanding for
10 almost as long as they have. We served ours a week later.
11 We've received almost nothing. Meanwhile, we have a team of
12 lawyers around the clock producing documents that are all
13 relevant, there is 134,000 of them. We have logs as to what
14 each of them are by Bates number. When they've requested
15 certain documents, we've culled them out.

16 In our reply brief the Court will note that we
17 responded to every -- or I should say our opposition, we
18 responded to every issue they raised by Bates number so they
19 could confirm that they had it. They're making a motion to
20 compel on documents they have. We identified them by Bates
21 numbers.

22 Whereas we're making a motion to compel because we
23 don't have anything. They are not identifying Bates numbers.
24 They are not cooperating. Where are the 65,000 documents that
25 VeriSign's lawyer estimated that they would produce. We don't

1 have any e-mails. We have nothing from VeriSign about what
2 went on internally. We don't have any e-mails about how they
3 are concerned about these new domain names in general and
4 Negari in particular and about the advertising campaigns that
5 they complain about. We can't defend the case without them.
6 We just want VeriSign to respond to the discovery that we
7 served. We're running out of time, and we've produced
8 everything we have.

9 THE COURT: All right. Well, I am going to ask you
10 all to go out and discuss these issues so that you can come
11 back and articulate to me a little bit better where things
12 stand with regard to the ESI.

13 I would also like you both to be prepared to go
14 through the outstanding discovery so that I can understand what
15 either has been produced or is going to be produced and exactly
16 what the timeline is, or if VeriSign is standing on its
17 objections, what is being withheld. Okay?

18 MR. NEWMAN: Yes, Your Honor.

19 THE COURT: Thank you.

20 MR. MILLER: Thank you.

21 THE COURT: Thank you.

22 NOTE: At this point a recess is taken; at the
23 conclusion of which the hearing continues as follows:

24 MR. MILLER: Your Honor, I think I can summarize
25 where we are. Mr. Newman can correct me if I misstate it.

1 But what we would do is we would agree to an order
2 entering today that would require VeriSign, us -- let's talk
3 about us first.

4 We've been telling Mr. Newman that we're going to be
5 producing documents. And so, what we have agreed is that we
6 will be completed with all of our document production within
7 three weeks. So that's the first point.

8 The second point is, we're not going to wait, of
9 course, until three weeks. We're going to move as quickly as
10 possible and begin document production on a rolling basis --
11 we're going to continue our document production on a rolling
12 basis. So next week there will be a production, the week after
13 that there will be a production, and all documents that we have
14 agreed to produce will be produced no later than three weeks
15 from today.

16 So that's the first element of the order.

17 THE COURT: Okay.

18 MR. MILLER: Okay. The second element of the
19 order -- let me now shift to like our motion against them. We
20 weren't able to get the lawyer, Mr. Linky, on the phone, he's
21 in California and he is the person who is most knowledgeable
22 about -- like some of the specific questions. Like we're
23 asking for these specific e-mails. And we are concerned that
24 we're not getting production of these e-mails that we need for
25 the deposition. We're just not going to be able to get the

1 answer -- I know Your Honor has a scheduling issue. We're just
2 not going to be able to get the answer right now. But we think
3 it might make sense that, you know, we'll get -- we'll try to
4 drill down and narrow those issues. We'll all be meeting on
5 Monday at the deposition of Mr. Negari anyway.

6 What we would request, and subject to the Court's
7 schedule, is that maybe we keep our motion to compel open and
8 we have a phone call with you either Tuesday or Wednesday
9 depending upon your availability. If we were able to call in,
10 we can then report status with the anticipation that we should
11 be able to narrow the issues and maybe only have a couple
12 things left.

13 THE COURT: Okay. Mr. Newman, is that your
14 understanding of where things stand?

15 MR. NEWMAN: My understanding is the Court will grant
16 XYZ's motion to compel requiring VeriSign to produce within
17 three weeks and a rolling basis until then. And that
18 VeriSign's motion won't be granted or denied, it will remain
19 open so that I can answer VeriSign's questions about where
20 particular documents are.

21 THE COURT: Okay.

22 MR. MILLER: Okay. My colleague is just telling me
23 to make clear that we've agreed to this, but it's not that the
24 motion -- every single thing in the motion to compel is being
25 granted wholesale, it's just as we've stated it.

1 THE COURT: I understand that. Part of the problem
2 is one of timing. And both parties have been saying
3 repeatedly, we're not objecting to a particular area, but we
4 also acknowledge we haven't produced it yet. And what I
5 understand you're saying is that you are committing to a
6 rolling production that will have a final end date three weeks
7 from now.

8 MR. MILLER: Yes, all the documents that we say that
9 we are going to produce will be produced --

10 THE COURT: Correct.

11 MR. MILLER: -- on a rolling basis --

12 THE COURT: Let me this question. And I accept that
13 and I will order that, and that's now part of the record. So
14 that three-week deadline is imposed on VeriSign. And to that
15 extent, the motion is granted.

16 To the extent that there are documents that should be
17 produced to which there is no objection lodged, VeriSign must
18 produce them at the earliest possible date no later than three
19 weeks from today.

20 MR. MILLER: Correct, on a rolling basis. And so
21 we'll --

22 THE COURT: So that motion is granted in part.

23 Now, while we are here, to the extent there are
24 specific categories on which VeriSign is standing on an
25 objection and believes that it is not relevant or it is

1 overbroad, and XYZ, as XYZ has put in its papers and Mr. Newman
2 has said today, is seeking all of the documents that it has
3 asked for, it doesn't sound to me like they have withdrawn any
4 of those requests, are there specific issues, categories which
5 we can address right now and I can rule as to whether or not
6 they need to be produced or not?

7 MR. NEWMAN: Your Honor, XYZ is happy to argue today
8 or attempt to resolve it with VeriSign and confer on it later.
9 We do request every document that we have requested thus far.
10 And we don't agree with any of VeriSign's objections.

11 VeriSign's counsel just suggested that we continue to
12 meet and confer on it. And I am willing to do that, especially
13 because we are going to see each other in person on Monday, but
14 I just want the record to be clear that all the issues raised
15 in our motion remain open. The Court has granted it in part,
16 and the remaining part should remain open, Your Honor.

17 THE COURT: Very well. I'm certainly not going to
18 force the parties to resolve those differences if you can do it
19 bilaterally, which, frankly, is the way I think everyone would
20 have preferred to have it done without getting to this point.
21 So I'm not going to unnecessarily make us go through each
22 category.

23 This is what I am going to do, however. In light of
24 what counsel has represented, I am going to grant in part the
25 defendants' motion to compel. I am going to grant it with

1 respect to the timing and requirement of production as counsel
2 have represented. That it will be on a rolling basis. That to
3 the extent documents are available and capable of being turned
4 over, they will be turned over at the earliest possible time,
5 and it will be complete no later than three weeks from today.

6 I understand that the defendants have as of yet not
7 withdrawn, or compromised, or agreed to narrow in any
8 particular respect their requests. I don't think that is a
9 wise legal strategy, and I would encourage you to think very
10 carefully about what it is you need.

11 I am not going to make a ruling right now, but I will
12 suggest that looking at this, there are many categories where
13 it is appropriate for the defense to have sought the
14 information. For example, issues having to do with a defense
15 of unclean hands or the notion that VeriSign was engaged in
16 similar advertising, or discount, or free pricing seems to me
17 an appropriate area.

18 Again, I'm not ruling, but I'm suggesting that where
19 you can tie your request to specific legitimate defenses that
20 are relevant to the claims at issue, that there is a basis for
21 producing that.

22 To the extent they are wildly overbroad or
23 speculative as to something that may lead to something that may
24 lead to something that could be relevant, maybe you want to
25 rethink your demand.

1 And likewise, as you've both discussed, you raised
2 the issue of every document related to .com, which means
3 essentially every e-mail in existence since the beginning of
4 time, I'm sure that's not what the plaintiffs intended. What
5 they are trying to seek is information, as they've articulated,
6 about specific factual representations, the number of people
7 that have been registered, the scarcity of .com names
8 available. These are the false statements that they have
9 alleged that seem to be the heart of their complaint.

10 Figuring out how to identify those documents and
11 those documents talking about VeriSign seems to me a logical
12 and common sense way to understand that request.

13 The idea that somebody would want every document that
14 has the suffix .com in it strikes me as preposterous. There is
15 nothing they could do with that. It's not relevant to all the
16 claims. It is about the notion of .com as a top domain level
17 and the advertising and potential competition between the
18 entities.

19 So again, I'm not ruling on substance. I'm trying to
20 give you a framework to think about how you may narrow your
21 requests.

22 Likewise, to the extent there are specific areas that
23 you object to that are not part of this production that you're
24 making, I want that to be made very clear so that we can
25 crystalize amongst the 94 requests for production of documents

1 what is really at issue, what you really need, and what you
2 really think is overbroad or not relevant. Because there was a
3 lot of talking past each other in these papers, and I think we
4 could have avoided a lot had those discussions taken place in a
5 more comprehensive way.

6 So I appreciate that you are making the effort now
7 and we are going to hold these matters open.

8 With regard to the plaintiff's motion, I am happy to
9 try and address specific issues if they are not worked out as a
10 result of the deposition. And it may be that being in one
11 place together will allow you to focus on what it is you are
12 missing.

13 I understood to a certain extent that Mr. Newman was
14 making certain representations about the universe of e-mails,
15 either that they have been produced already and you may not
16 have identified them or be aware of them, or they simply don't
17 exist.

18 And, of course, there is nothing I can do to grant a
19 motion to produce documents that don't exist. I will say
20 this -- and I'm going to finish in one second. On the issue of
21 ESI, clearly you recognize that you must produce documents in a
22 format that both sides are capable of looking at, whether it's
23 Relativity, whether it's some other database, you can talk to
24 each other and figure out the best mechanism for providing it
25 in a native file format, or in Excel if it is Excel, or if it

1 is OCR readable.

2 I will say this. I cannot understand why 40,000
3 pages of single PDFs of an Excel spreadsheet would be produced.
4 I cannot think of a logical and rational reason for doing that.
5 It should not require the other side to say, now give it to me
6 in a format that I can use it. If it is in fact gibberish and
7 unusable is the same thing as not producing it at all. And
8 everybody has an obligation to try and reduce costs and be
9 efficient.

10 So what I want you to do is to make sure that you
11 produce things after discussion in the appropriate native file
12 format or in a standard loadable form that is consistent with
13 whatever database you are using. And if there is a problem,
14 you can bring it to the Court's attention, but that problem
15 should only arise if you have had a good faith conversation to
16 make sure that it's being provided in the first instance in a
17 way that is searchable and understandable.

18 For example, with regard to the outstanding motion to
19 compel, if e-mails are there, but they're in PDF format, or
20 they're not searchable, or it's not possible for them to put
21 all of Mr. Negari's e-mails in an easily findable place, then
22 you've got to think about the way that was provided. To say,
23 I've given 124,000 pages of documents and you have all the
24 e-mails and they have no idea where they are, is simply playing
25 games.

1 And so, I will suggest that you talk to each other.
2 One way to solve that is to provide it in a form that they can
3 search and find it themselves. Another way to do that is to
4 provide all of the Bates ranges of where the Negari e-mails
5 are. So that if you represent, I've provided all the e-mails,
6 and there are hundreds or thousands of them and they think
7 there are only six related to Donuts, Inc. or whatever it is,
8 there is an answer to where those are, and they should be able
9 to find them.

10 Do you understand?

11 MR. NEWMAN: Yes, Your Honor.

12 THE COURT: And that applies to both sides. It
13 applies to the e-mails that plaintiff is providing as well.

14 And so, with those recommendations or admonitions, I
15 want to make sure that if we have future discovery disputes,
16 that the party who is bringing the motion represents not only
17 that there has been a meet and confer as is already required,
18 but there is a description of the meet and confer. And that it
19 is not done by e-mail. And that it is not done 24 hours or
20 even 48 hours before the hearing or before the motion is filed.
21 It needs to be at least a week in advance, and it needs to be
22 speaking by telephone, and it needs to be lawyers who have a
23 full understanding of the case and the capacity to be able to
24 answer the questions about where the discovery is.

25 And that needs to be in the motion if the parties

1 can't work it out. And I will impose costs the next time we do
2 that if we can't figure out a way to sufficiently communicate
3 beforehand. I am confident that you all can do this. But
4 there's clearly been some talking past each other.

5 MR. MILLER: Thank you, Your Honor. Those points are
6 incredibly helpful, so we will work very hard to execute on
7 those instructions.

8 I just had a couple quick questions. So could we get
9 on your calendar for like say Tuesday and Wednesday or a day
10 that --

11 THE COURT: Yes.

12 MR. MILLER: -- maybe Wednesday morning?

13 THE COURT: And the best way to do that is to call
14 Ms. Genti or Ms. Gharbieh in my office and we can find the time
15 that works.

16 MR. MILLER: Okay.

17 THE COURT: I will be in the office next week. I
18 have various matters on the calendar. Wednesday morning may be
19 difficult, but I could do probably Wednesday afternoon.

20 MR. MILLER: Okay. We will work through your office
21 to find a convenient time --

22 THE COURT: You can work that out and find a time.

23 MR. MILLER: -- and we'll schedule that.

24 THE COURT: And that would be to resolve any
25 outstanding issues regarding the plaintiff's motion --

1 MR. MILLER: Correct --

2 THE COURT: -- which is being held in abeyance.

3 MR. MILLER: And we will work very hard to execute on
4 those recommendations and instructions that you just gave us,
5 and maybe we can solve it and won't need the phone call, but
6 maybe we will, and I just wanted to have an opportunity
7 before -- not to have to wait until Friday given where we are.

8 THE COURT: Yes, that's fine.

9 MR. MILLER: Then, just two more quick points. I
10 wanted to let you know, Your Honor, that there are nonparty
11 subpoenas around the country that are being -- some of them are
12 being litigated. In other words, there are motions to
13 compel -- there is a motion to compel that was filed in
14 Seattle.

15 THE COURT: Right, that's the Donuts, Inc.

16 MR. MILLER: Donuts. I anticipate that there might
17 be two or three other motions to compel filed as to nonparties
18 in various states around the country. I just wanted to give
19 you the heads-up that that's occurring.

20 Sometimes because no court moves quite as swiftly as
21 this court, it will be clear that the time for discovery will
22 come and go before some court somewhere far away may ever
23 consider it. So I believe that in many instances, if not all,
24 we will ask for transfer to this court.

25 Now, I was talking to Mr. Reilly and a couple other

1 folks who said that because this rule is new, Rule 45 subpoena
2 is relatively new, and there have been some informal procedures
3 percolating up and that I should at least tell you that this is
4 occurring and about the pendency of the motion to transfer
5 venue, and somebody had suggested that there might be phone
6 calls possible between courts. I just don't know -- I'm not
7 asking you to give us advice, I'm just letting you know that
8 this is occurring and see if you have any further instructions
9 on that score for us.

10 THE COURT: I appreciate you letting me know. I
11 don't have any further advice.

12 MR. MILLER: Okay.

13 THE COURT: I am familiar with the issue in the
14 abstract, and certainly hear third-party subpoena motions to
15 quash for matters that have arisen in other districts. You
16 know, to the extent there is a mechanism to have those
17 transferred and resolved here so it can be done more
18 expeditiously and can be done by the court that is dealing with
19 the issue fundamentally, I'm certainly open to it --

20 MR. MILLER: Okay.

21 THE COURT: -- to the extent the rules permit it.

22 MR. MILLER: Okay.

23 THE COURT: You know, I can't speak for a judge in
24 another part of the country --

25 MR. MILLER: Understood.

1 THE COURT: -- who may get the motion and, you know,
2 look at whether he or she wants to retain jurisdiction over it
3 or not. But I appreciate the heads-up.

4 To the extent that there is some relevance to whether
5 the home court is willing to do it, certainly you can let me
6 know if that's something that needs to be communicated.

7 MR. MILLER: Okay. I'll report back on that. And
8 then the final point, I just want for clarification because
9 there was a statement made this morning about we didn't, we
10 VeriSign didn't produce in a particular electronic format, that
11 I just need to -- I need to make a statement for the record to
12 set the record straight.

13 The request about reproduce the stuff that wasn't
14 produced in a readable native format related to Web sites of
15 the defendant. And we have offered to make those available.
16 We didn't know whether he wanted an HTML or native, other type
17 of native OCR format. We are going to do that.

18 With respect to VeriSign documents, like our internal
19 documents, every single one of them in all instances were
20 produced in accordance with the electronic protocols, that they
21 were in native format like the Excel spreadsheets and the
22 e-mails and what not.

23 I just wanted to make that clear because when we met
24 and conferred about it, counsel recognized that it was limited
25 to the defendants' Twitter feed and Web site that he was

1 requesting, and we're happy to do it. It did not relate to
2 VeriSign documents. It is very important because, you know, we
3 took very painful and expensive steps to make sure that we were
4 complying in terms of producing VeriSign documents properly,
5 and we have done so, and we have done so in every instance.
6 And I wanted to make the record clear on that.

7 THE COURT: Well, I appreciate that. And I think the
8 clarification that I've provided regarding my expectation of
9 both parties with regard to ESI hopefully should eliminate
10 future confusion or disputes over that.

11 Have I addressed everything that needs to be
12 addressed for the time being? I realize it leaves certain
13 matters open, but I'm hoping that with further communication
14 you can either eliminate or reduce matters in dispute further.

15 MR. NEWMAN: For XYZ, yes, Your Honor. Thank you
16 very much.

17 THE COURT: Thank you.

18 MR. MILLER: Thank you.

19 THE COURT: Thank you. Court is in recess.

20 NOTE: The hearing concluded at 11:47 a.m.

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C E R T I F I C A T E o f T R A N S C R I P T I O N

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5 I hereby certify that the foregoing is a true and
6 accurate transcript that was typed by me from the recording
7 provided by the court. Any errors or omissions are due to the
8 inability of the undersigned to hear or understand said
9 recording.

10

11

12 Further, that I am neither counsel for, related to,
13 nor employed by any of the parties to the above-styled action,
14 and that I am not financially or otherwise interested in the
15 outcome of the above-styled action.

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/s/ Norman B. Linnell

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Norman B. Linnell

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Court Reporter - USDC/EDVA

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